



Keeping Up with Compliance: How to Successfully Generate Leads in the Face of Regulation

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Jonathan Pompan, partner and co-chair of Venable’s Consumer Financial Services Practice Group, has extensive experience representing financial services companies, including some of the largest debt buyers and collectors and advertisers of financial services in the country, other consumer financial services providers, and their service providers. This work gives him considerable insight into successful strategies for satisfying new and evolving regulatory expectations.

Jonathan has assisted clients in bet-the-company government investigations and litigation pursued by federal agencies such as the CFPB and the FTC, as well as in-state enforcement proceedings involving state attorneys general. His experience includes several CFPB investigations and examination preparation and appeals. In addition, he provides ongoing compliance and general counseling advice to several clients in the Fintech and advertising and marketing sectors.

Jonathan is a frequent speaker, organizer, and moderator of conference panels, and author on legal and regulatory issues of significance to financial services companies and their advertisers and marketers. He also was a panelist at Follow the Lead: An FTC Workshop on Lead Generation.

For an index of articles and presentations on related legal and regulatory topics, see www.Venable.com/cfs/publications; and www.Venable.com/leads/publications.

Today's Session

- The Basics
- Legal and regulatory landscape
- Contract terms that make an impact
- Vendor management and surviving third-party monitoring
- Preparing for regulatory transformation and evolving trends
- A risk management strategy for defensible lead buying and selling

Basics of Lead Generation Law

Sources of Legal Authority and Enforcement

- **Dodd-Frank Act (DFA) / Consumer Financial Protection Act (CFPA)** authority regarding **unfair, deceptive or abusive acts or practices (UDAAP)**
 - **Consumer Financial Protection Bureau**
 - Rule Writing Authority
 - Applicable to any person that engages in offering or providing a consumer financial product or service and any service provider
 - Supervision and Enforcement authority for banks over \$10b and nonbank entities
 - State Attorneys General
- **Federal Trade Commission Act (FTC Act)** authority regarding unfair or deceptive acts or practices (**UDAP**)
 - Federal Trade Commission
 - Federal Banking Agencies
- **Mini-FTC Acts** authority regarding many aspects of UDAP (varies by state)
 - State Attorneys General
 - Some Private Right of Actions
 - Federal Consumer Financial Law
- State Licensing (e.g., money transmission, lending, mortgage, credit card, insurance, etc.)

CFPA UDAAP Breakdown

Section 1031 of the DFA

- Unfair (similar to Section 5 of the FTC Act)
- Deceptive (similar to FTC Act guidance)
- Abusive (similar to Telemarketing Act and Telemarketing Sales Rule)

Abusive (new in the DFA) is defined as an act or practice that:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- Takes unreasonable advantage of:
 - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
 - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer

FTC Act UDAP Authority Breakdown

- Source of authority:
 - Section 5 of the FTC Act, Section 8 of the Federal Deposit Insurance Act
- Authority of prudential regulators (but not the CFPB):
 - No rule-writing authority
 - No supervision and enforcement for supervised entities (any asset size)
- FTC does not have jurisdiction over nonprofit organizations and banks, but will bring enforcement against sham nonprofits, and service providers; and FTC Act is enforced by other federal financial regulators.

Act or Practice

- Applies to *all* products and services
- Applies to *every* stage and activity
 - Product development and rollout
 - Advertising
 - Direct marketing
 - Disclosures
 - Contracts
 - Account statements
 - Billing
 - Loan servicing/loss mitigation/collections
 - Third-party service providers

“Unfair” Act or Practice

- An act or practice is **unfair** where it:
 - Causes or is likely to **cause substantial injury** to consumers,
 - **Cannot** be reasonably **avoided** by consumers, and
 - Is **not outweighed by countervailing benefits** to consumers or to competition
- Public policy may be considered
- Must meet all three factors to be considered unfair.

“Unfair” Act or Practice: Substantial Injury, Avoidable, Benefits

- **Not reasonably avoidable** – Cannot be reasonably avoided by consumers
 - Gov’t will consider whether the act or practice:
 - Unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making,
 - Interferes with the consumer’s ability to effectively make decisions, or
 - Subjects consumers to undue influence or coercion
- **Not outweighed by benefits** - Is not outweighed by countervailing benefits to consumers or to competition
 - Offsetting benefits to consumers may include:
 - Lower prices
 - Wider availability of products and services
 - Also consider the offset of costs to remedy or prevent the injury, such as:
 - Cost to the bank to take preventive measures
 - Cost to society of any increased burden
- **Injury** - Causes or is likely to cause substantial injury to consumers
 - **Injury:**
 - Usually involves monetary harm
 - May include other tangible harm
 - Does not include emotional or other subjective harm
 - **Substantial:**
 - Small amount of harm to a large number of people
 - Significant risk of concrete harm to small number of people
 - Not trivial or speculative harm

“Deceptive” Act or Practice

- Regulators have found acts or practices to be **deceptive** if they have these three conditions present:
 - The representation, omission or practice is **likely to mislead consumers**
 - Who are **acting reasonably** in the circumstances presented, and
 - The representation, omission, or practice is **material**.
- Must meet all three of the of the above factors to be considered unfair

“Deceptive” Act or Practice: Misleading

- Misleading – There is a representation, omission, or practice that misleads or is likely to mislead the consumer
 - Representation: Express or implied claims or promises, written or oral
 - Omission: Disclosure of the omitted information is necessary to prevent a consumer from being misled
 - Misleading: Government will evaluate the representation or omission in the context of the entire advertisement, transaction, or course of dealing
 - Actual deception is not required

Four “P’s” of Deception

<u>PROMINENCE</u>	Is it BIG enough for consumers to notice and read?
<u>PRESENTATION</u>	Is the wording and format easy for consumers to understand?
<u>PLACEMENT</u>	Is it where the consumers will look?
<u>PROXIMITY</u>	Is it near the claim that it qualifies?

“Abusive” Acts or Practices

- The CFPA makes it unlawful for any covered person or service provider to engage in an “abusive act or practice.” An abusive act or practice:
- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or
- Takes unreasonable advantage of –
 - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
 - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Basic UDAP Concepts

- Act or practice may be: unfair, deceptive, abusive or one, two of all
- An act or practice does not have to violate any other law to be considered unfair or deceptive
- There is a three-part test for “deceptive”:
 - Does it mislead?
 - **EXAMPLE:** Offering pricing that isn’t actually available or is only available for a limited time. Also, a web page where the disclosures are not conspicuous or easy to follow back to a specific feature.
 - Is it reasonable for this consumer?
 - **EXAMPLE:** Is the offer targeting the elderly or an unsophisticated consumer who probably won’t fully understand the product or service?
 - Are the disclosures adequate?
 - **EXAMPLE:** Disclosures should fully explain the costs, uses, and benefits of the product or service.

Relationship with Other Laws

- Acts or practices that violate section 5 of the FTC Act, or sections 1031 or 1036 of Dodd–Frank, may also violate other federal or state laws or regulations.
- Conversely, practices that comply with other federal or state laws may still violate the FTC Act or Dodd–Frank.
- Source of additional information:
 - Dodd–Frank explains the elements of (1) an unfair act or practice and (2) an abusive act or practice. See 12 USC 5531(c) and (d).
 - Consumer Financial Production Bureau (CFPB) Bulletin 2013-07, “Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts,” explains the elements of a deceptive act or practice.
 - CFPB’s “Statement of Policy Regarding Prohibition on Abusive Acts or Practices,” at 85 Fed. Reg. 6733.

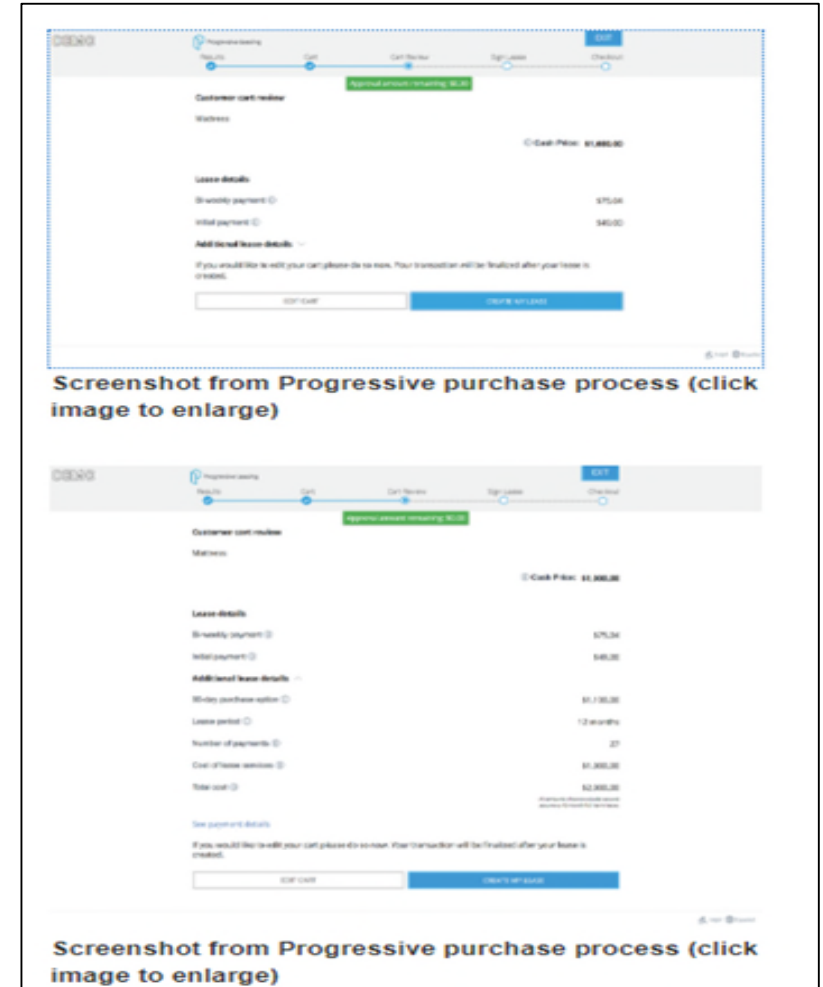
Evolving Legal and Regulatory Landscape

The Federal Trade Commission

- **Enforcement:** Business kind of as usual
 - Advertising:
 - Website design
 - Misleading forms and representations
 - Failure to police affiliates
 - Deceptive rankings of financial products and fake reviews
 - UDAP, Regulation E, and TILA
 - *FTC v. Lead Express, et al.* (Harvest Moon Financial) – Payday lending and tribal enterprise

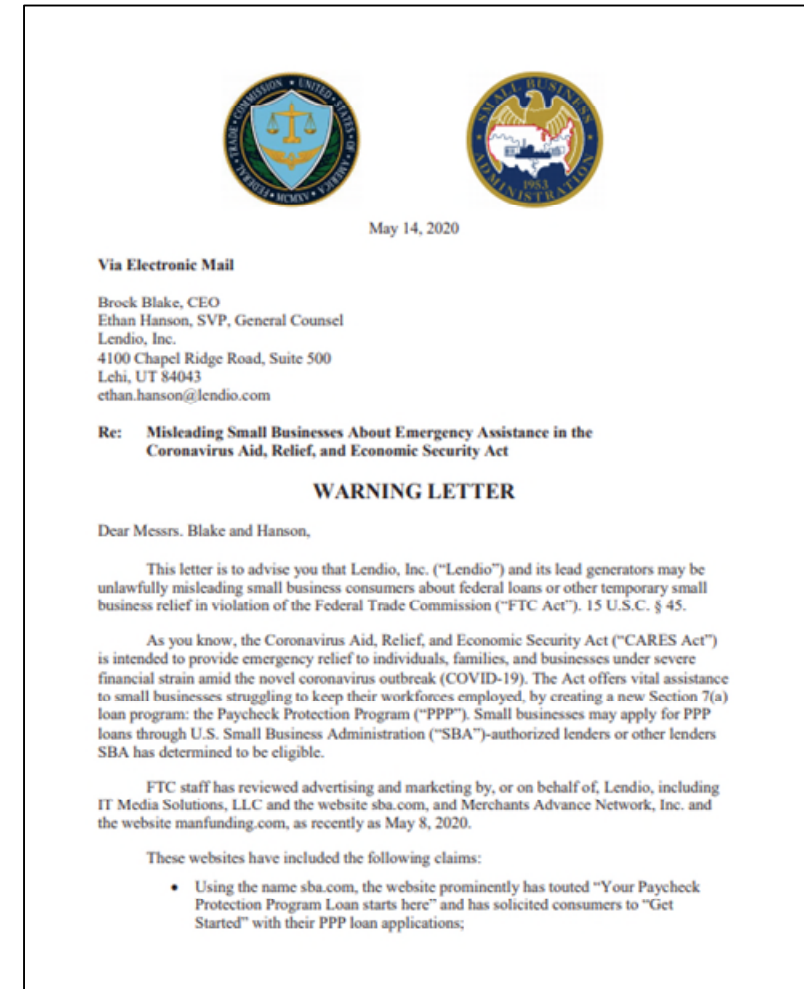
FTC v. Progressive Leasing

- Rent-to-own payment plans in retail stores.
- Alleged misleading marketing of payment plans, e.g., “same as cash” or “no interest.”
- Alleged company was aware of consumer confusion with > 15k complaints in 15-month period.
- \$175m settlement for refunds; prohibition on misrepresenting the cost, terms, or nature of its plans; and must get consumers’ express, informed consent before charging or billing them; monitoring of third party, such as retailers.
- Dissent - Commissioner Rebecca Kelly Slaughter contended that the proposed settlement does not adequately remediate harm or achieve appropriate deterrence. She advocated for (i) higher monetary relief, closer to the total amount Progressive charged consumers over the cash price—in excess of \$1 billion; (ii) individual liability for Progressive’s CEO because he participated directly in the allegedly illegal practices or had authority to control them and because Progressive’s parent company, Aaron’s, had been subject to prior FTC actions; and (iii) charging Progressive with a violation of the Restore Online Shoppers’ Confidence Act (ROSCA).
- **Takeaways:** FTC will look at company more than once; importance of disclosure and digital design; responsibility for third parties, such as retailers (e.g., lead generators for financing).



FTC and SBA Warn Operator of SBA.com and Lead Generator Lendio to Stop Potentially Misleading Coronavirus Relief Loan Marketing



- The FTC and SBA sent warning letters to two companies that may be misleading small businesses seeking SBA loans as a result of the coronavirus pandemic.
- Concerns: marketing could lead consumers to believe they are affiliated with the SBA, or that consumers can apply on their site for loans through the Paycheck Protection Program (PPP) or other programs authorized by the Coronavirus Aid, Relief, and Economic Security (CARES) Act.
- Warn recipients to take immediate action to ensure all deceptive claims are removed and to remediate any harm to small business consumers as a result of the claims. The letters also instructed the recipients to notify the FTC within 48 hours about the specific actions they have taken to address the agency's concerns.



FTC Charges Telemarketing Operation with Misleading Job Seekers and Making Millions of Illegal, Unsolicited Calls

- Charged a telemarketing operation and its owners with alleged violation of Telemarketing Sales Rule (TSR) by making millions of illegal, unsolicited calls about educational programs to consumers who submitted their contact information to websites promising help with job searches, public benefits, and other unrelated programs.
- “Telemarketers have a duty to ensure that they are not placing calls to people on the National Do-Not-Call Registry,” said Andrew Smith, director of the Bureau of Consumer Protection. “And they cannot rely on affiliate websites that use fine print and other deceptive tactics to lure consumers.”
- Issues: Small print, deceptive consent, unrelated offers

Allegedly Problematic Websites



FTC Settlement with Operator of Post-secondary Schools Offers an Education in Lead Generation

- Operator of numerous post-secondary and vocational schools currently attended by 35,000 students, primarily online. In addition to advertising its schools on radio and TV, on the internet, and in social media – promotions that often targeted members of the military – CEC used more than 70 lead generators, some of whom acquired leads by means of deception or illegal phone calls.
- Allegations:
 - FTC says school should have known that the leads had been acquired through deception, and school didn't alter the alleged deceptive misimpression that the sites were for military recruiting or employment.
 - School approved telemarketing scripts that included flat-out falsities – for example, scripts that told telemarketers to identify themselves in voicemail greetings as working at “Military Verification Services.”
 - DNC violations
- Settlement:
 - \$30 million in consumer redress
 - a system to review all materials that lead generators use to market its schools, investigate complaints about lead generators, and to not use or purchase leads obtained deceptively or in violation of the TSR
 - prohibits misrepresentations about any other benefits of any post-secondary school or any other of the defendants' products or services

Case: 1:19-cv-05739 Document #: 11 Filed: 10/09/19 Page 1 of 24 PageID #:92
Case: 1:19-cv-05739 Document #: 5 Filed: 08/27/19 Page 1 of 24 PageID #:62

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

CAREER EDUCATION CORPORATION, a
corporation,
AMERICAN INTERCONTINENTAL
UNIVERSITY, INC., a corporation,
AIU ONLINE, LLC, a limited liability company,
MARLIN ACQUISITION CORP., a corporation,
COLORADO TECH, INC., a corporation, and
COLORADO TECHNICAL UNIVERSITY,
INC., a corporation,
Defendants.

Case No. 19 cv 5739

STIPULATED ORDER
FOR PERMANENT
INJUNCTION AND
MONETARY
JUDGMENT

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), filed its Complaint (“Complaint”) for a permanent injunction and other equitable relief, pursuant to Sections 13(b), 19, and 16(a)(1) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b), 57b, and 56(a)(1), and the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. § 6101 et seq. Defendants have waived service of the summons and the Complaint. The Commission and Defendants

1

Operators of Comparison Shopping Website Agree to Settle FTC Charges Alleging Deceptive Rankings of Financial Products and Fake Reviews

- The operators of a website that compares student loans and other financial products have agreed to settle FTC allegations that they misled consumers to believe their website provided objective product information, when in fact they offered higher rankings and ratings to companies that paid for placement.
- Falsely claimed that the website provided “objective,” “accurate,” and “unbiased” information about consumer financial products, such as student loans, personal loans, and credit cards. Misrepresents that the information on its website was not affected by compensation from advertisers.
- Alleged reviews were written or made up by LendEDU employees, their families or friends, or other individuals with personal or professional relationships with LendEDU.
- Settlement: prohibit the company and its operators from making the same types of misrepresentations cited in the FTC’s complaint; and \$350,000

VENABLE LLP

The screenshot displays a webpage titled "Top 9 Companies for Student Loan Refinancing: In-Depth Reviews". It lists three companies with their logos, key benefits, and a "VISIT SITE" button. Each company's entry includes a 5-star rating and a green button with the text "VISIT SITE >>".

Top 9 Companies for Student Loan Refinancing: In-Depth Reviews

1. SoFi

- Reduce your payment and interest rate.
- Members save \$22,359 in 15 minutes!

- Refinance and consolidate both federal and private student loans
- 5, 7, 10, 15, 20 year repayment terms
- Rates as low as 2.89% for variable rates
- No application fees, origination fees, or pre-payment fees
- Rates as low as 3.25% for fixed rates
- Unemployment protection is available
- Easy application process

2. Earnest

- You could save a boat load.
- Customers save \$21,810 on average!

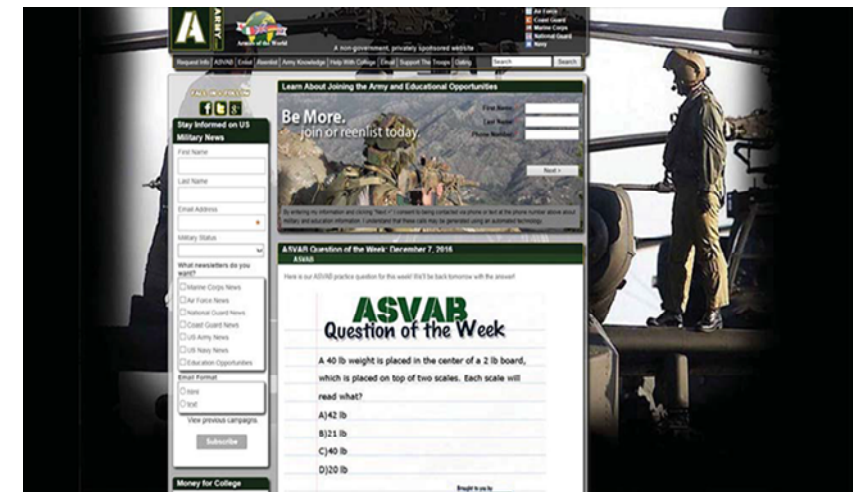
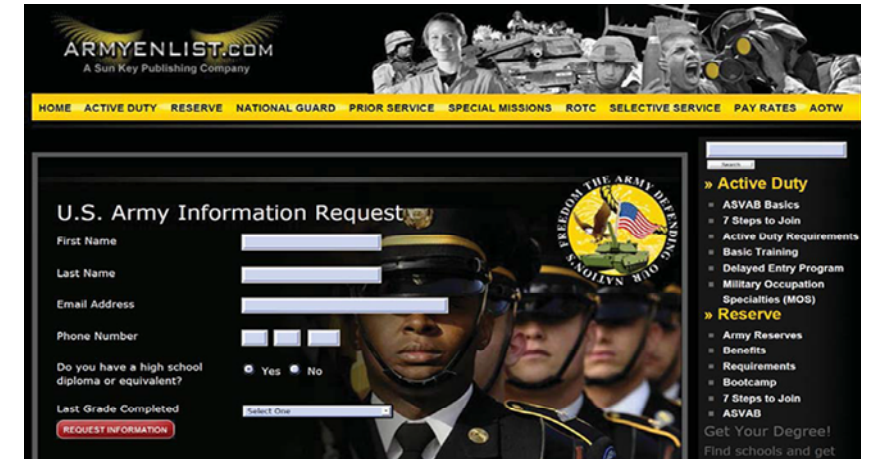
- Refinance and consolidate both federal and private student loans
- Fixed rates as low as 3.25%
- 5 - 20 year repayment terms
- Data-driven customer evaluation helps you get qualified
- Variable rates as low as 2.57%
- Zero application fees, origination fees, or pre-payment fees

3. LendKey

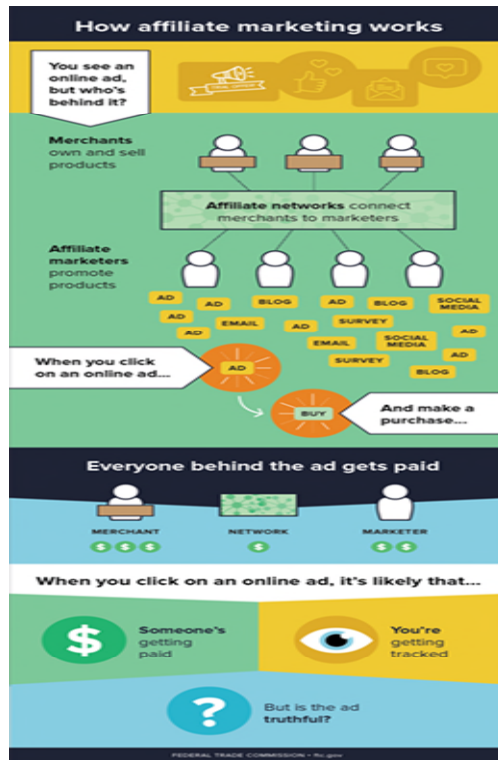
- You deserve a better student loan.
- Average client saves \$16,657!

FTC Takes Action Against the Operators of Copycat Military Websites

- Operators of copycat websites army.com and navyenlist.com agreed to settle FTC charges that they targeted people seeking to join the armed forces and tricked them by falsely claiming to be affiliated with the military in order to generate sales leads for post-secondary schools.
- Charged the defendants with violating the FTC Act and the TSR. The agency also alleged that they violated the DNC provisions of the TSR by placing hundreds of thousands of illegal telemarketing calls to phone numbers on the National DNC and by failing to pay required fees.
- The two proposed orders settling the FTC's charges require the defendants to turn over to the FTC websites used to deceive consumers, including army.com and navyenlist.com.
- Turnover of these websites partially satisfies the civil penalty judgments of \$11.1 million against Sunkey and \$1 million against Fanmail, otherwise suspended due to defendants' inability to pay; however, if the defendants are later found to have misrepresented their financial condition to the FTC, the full amount of the penalty would become due.
- Ban on military affiliation, endorsement or extent to which share personal information.



The Legal Intersection and Your Requirements: Lead Generation and Affiliate Marketing



- The FTC and CFPB are watching the use of lead generation
 - If you use affiliate marketing, make sure you know what your advertisers are telling your customers to get them in the door
 - Watch out for free offers, gifts, subscriptions, and competitions

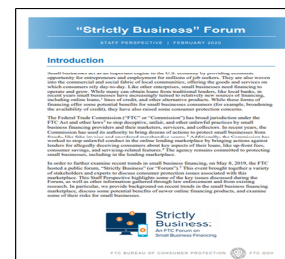
- FTC Advertising Disclosure Guidance for Online Influencers

- Endorsement Guide Update on horizon

- Small Business Financing Forum

Follow the Lead

An FTC Workshop on Lead Generation



Consumer Financial Protection Bureau

- CFPB constitutionality: *Seila Law v. CFPB* & Ratification
- Providing guidance and regulatory relief – not just on the phone
 - Two No Action Letters issued in March (mortgage servicing loss mitigation software and small dollar lending)
- Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic
- Enforcement focus
- Guidance to financial firms during the pandemic (billing error responsibilities and change in account terms without notice) – Supervisory Examinations

The CFPB: Still Going

- Enforcement focus:
 - Oversight of vulnerable populations more likely to result in new lawsuits (those in debt, elderly, service members, students).
 - Ongoing litigation will continue, dependent on courts and opposing parties.
 - Continuing investigations with no in-person contacts – e.g., data requests (CIDs).
- Recent cases:
 - Cross-selling incentives and account opening issues.
 - Advertised mortgages, but provided leads to student loan debt relief companies.
 - Credit repair offers and services.
 - Key takeaways: State what you mean, strengthen and review compliance, analyze customer complaints — don't just answer them.



Regulatory Consumer Protection Priorities: Federal and State

Regulatory Consumer Protection Priorities: Federal and State

- **Material Terms** - Disclose clearly to consumers who you are and how you will share their information.
- **Claim Substantiation** - Monitor lead sources for deceptive claims and other warning signs like complaints.
- **Joint Liability/Service Provider/Substantial Assistance** - Vet lead buyers/sellers and avoid buying remnant leads with no legitimate need for sensitive data.
- **Privacy & Data Security** - Keep sensitive data secure.
- **State Licensing, Valid When Made & True Lender**
 - California Consumer Finance Lenders Law
 - Developments in light of *Madden v. Midland Fallout*
 - FDIC and OCC Rulemakings
 - True Lender TBD
 - Colorado/California Examples
 - State Usury and CFPB Enforcement
 - Conference of State Bank Supervisors
 - New CA Mini-CFPB

Enforcement Priorities Examples

Deceptive Claims

- Who can be held liable
 - Publisher
 - Affiliate Network
 - Service Provider
- (*FTC v. LeanSpa, FTC v. Inbound Call Experts,*
- *FTC v. Five Star Auto, CFPB v. ZP*)

Unfair Sale of Sensitive Data

- Payday Loan Applications
 - (*FTC v. Sequoia One, FTC v. Sitemsearch*)
- Confidential Phone Records
 - (*FTC v. Accusearch*)
- Debt Portfolios
 - (*FTC v. Cornerstone, FTC v. Bayview Solutions*)

State Regulatory Agencies

- CA Dept. Business Oversight

Contract Terms that Make an Impact

Contract Terms and How They Can Enhance Legal Compliance

- Exercise Due Diligence Pre-Contract
- Establish Contractual Requirements and Service-Level Standards for Compliance and Performance
- Reserve Audit Rights
- Representations and Warranties
- Monitor Vendors and Take Action
- Require Vendors to Maintain Same Standards with Subcontractors

Expert Analysis - Opinion

Companies Must Manage Lead Generators Responsibly

By Andrew Smith

Law360 (September 25, 2019, 4:44 PM EDT) -- Successful

manufacturers make supply chain management a top priority – asking questions about the source of raw materials they buy, building product specs into their contracts, reserving audit rights, exercising oversight authority, and insisting that vendors hold subcontractors to the same high standards. Recent law enforcement actions involving the lead generation industry show that advertisers should consider similar standards when the raw materials they buy are consumer leads.



Andrew Smith

The Federal Trade Commission's settlement with Career Education Corporation[1] is the latest in a series of cases that pull back the curtain on the arcane world of lead generation. The complaint alleges that CEC marketed its post-secondary schools through leads obtained from companies like Sun Key Publishing LLC[2] and Expand Inc.[3]

Vendor Management Contract Checklist

- Scope: license, ownership, data fields, etc.
- Cost and compensation
- Right to audit
- Monitoring and performance standards
- Confidentiality and security of information, including GLBA Privacy and Safeguards Rules
- Representations and Warranties
- Indemnification
- Default and termination
- Dispute resolution
- Limits on liability
- Insurance
- Customer complaints
- Recordkeeping
- Business resumption and contingency plan of service provider
- Foreign-based service providers and legal and regulatory considerations
- Subcontracting
- Other topics: AML/BSA, Credit Reporting, telemarketing, internal audit, risk management (e.g., models, interest rate calculations, etc.)



Vendor Management and Surviving Third-Party Monitoring

Best Practices for Vendor Management

- What tools are most effective to police your lead generators?
- The importance of third-party vendor vetting
- How can you ensure lead generators are actually doing what they say?
- What remedies do you have to address bad action?
- How to use your marketing spend to reward good partners
- Understanding how consumer behavior explains marketing patterns

A Risk Management Strategy for Defensible Lead Buying and Selling

Risks Associated with UDAP/UDAAP and Federal Financial Law

- Types of **Risks**:
 - Compliance – violations of law or regulation, and increasingly real or perceived consumer harm
 - Financial obligation – failure to meet the terms of any contract
 - Operational – inadequacy or failure of internal process or systems, human errors or misconduct, or adverse external events
 - Strategic – business decisions, implantation, or lack of responsiveness to changes
 - Reputation – negative public opinion
- **Consequences**:
 - Litigation and enforcement actions
 - Financial, including civil money penalties and monetary restitution
 - Injunctive relief
 - Debt cancellation/collectability on fees/repayment of loan, etc.

Steps to Stay in and Improve Compliance

- ❑ Due diligence
- ❑ Contractual requirements
- ❑ Audit and monitoring
- ❑ Monitor vendors and take action
- ❑ Require compliance with applicable legal and regulatory requirements by subcontractors



- ❑ Appoint line of business champion/compliance team
- ❑ Perform risk assessment
- ❑ Provide training for staff and affiliates
- ❑ Review advertisements and forms prior to use
- ❑ Strengthen complaint management and tracking
- ❑ Enhance written policies and procedures
 - ❑ UDAAP/Advertising & Marketing
 - ❑ Vertical Specific (e.g., mortgage, lending, insurance, etc.)
- ❑ Obtain state licenses, if needed
- ❑ Implement compliance monitoring
- ❑ Review new products and services before adoption
- ❑ Elevate compliance to management and board

Wrap-Up and Questions & Answers



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